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By Josephine R. Potuto*

Prison Disciplinary Procedures and Judicial Review Under the Nebraska Administrative Procedure Act

I. INTRODUCTION

In October 1976 Ronald Reed escaped from the Lincoln Work Release Center and was subsequently convicted of and sentenced for the crime of escape.[1] His escape also served as the basis for a prison disciplinary proceeding before the Nebraska Penal Complex Adjustment Committee in February 1978.[2] As a result of that hearing Reed lost all his accumulated good time[3] and was placed in

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1. State v. Reed, 205 Neb. 45, 286 N.W.2d 111 (1979).
2. In virtually all prison systems in the United States criminal offenses committed by a prisoner while incarcerated are also denominated and may be treated as major disciplinary infractions. *See* NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, MODEL SENTENCING AND CORRECTIONS ACT § 4-511, Comment (1979) [hereinafter cited as M.S.C.A.]. If a prisoner's activity constitutes a crime, as it did in *Reed*, he may be prosecuted, convicted, and sentenced for that criminal offense and in a disciplinary proceeding also lose substantial amounts of good time. Thus, he is penalized twice for the same violation. I consider this a bad policy result and, at a minimum, prefer the position taken in the M.S.C.A. (for which I was project director and a reporter) that good time lost in the disciplinary proceeding be credited against the new criminal sentence. M.S.C.A. § 4-511. It is also bad policy, and these situations occur much more frequently (at least when the criminal offense is something other than an escape), for even a serious criminal offense to be treated merely as a disciplinary infraction and not made the basis of a criminal trial. *See id.* §§ 4-511 to -512, Comments. Both the prisoner and society lose when this happens. At a disciplinary proceeding, even one in which substantial amounts of good time are lost, the prisoner is neither entitled to nor afforded the full panoply of constitutional rights, including the proof beyond a reasonable doubt burden, of a defendant at a criminal trial. Wolff v. McDonnell, 418 U.S. 539 (1974). On the other hand, the penalty to which the prisoner is subject at the hearing is substantially less serious than the potential criminal sentence could have been.
3. Good time reductions of the sentence imposed are common in most statutory sentencing schemes. In many jurisdictions, including Nebraska, good time is

the Nebraska Penal Complex Adjustment Center for six months. The disciplinary committee action was affirmed by the Nebraska Penal Complex Appeal Board. Reed then sued in district court for reversal of the disciplinary committee decision.[4] The district court dismissed Reed's petition, rejecting his argument that district court jurisdiction was provided by the judicial review sections of the Nebraska Administrative Procedure Act (APA).[5] In *Reed v. Parratt*,[6] the Nebraska Supreme Court, over a dissent by Chief Justice Krivosha,[7] rejected Reed's claim that the APA provides for judicial review of a prison disciplinary decision.

In this article I will examine the *Reed* decision, a decision that I believe demonstrates flawed legislative interpretation influenced by ill-advised policy considerations. I will also present alternatives to rectify the *Reed* result and thereby provide judicial review of prison disciplinary decisions.

II. INTERACTION BETWEEN THE PRISON DISCIPLINARY PROCEDURES STATUTE AND THE ADMINISTRATIVE PROCEDURE ACT

In 1976 the Nebraska Unicameral adopted specific provisions governing the procedures to be applied in disciplinary actions in state facilities administered by the Department of Correctional Services.[8] Among the requirements there set forth is a requirement that the department adopt rules and regulations to determine rights and privileges retained and forfeited by a prisoner.[9] Rules are required to govern, among other things:

> (a) disciplinary restrictions on clothing, bedding, facilities, mail, and visitations in an institution, (b) solitary confinement, (c) grievance procedures, hearings, and review, (d) good-time credit, (e) criteria for psychological treatment and sociological development programs, (f) rehabilitation opportunities, and (g) educational or employment programs.[10]

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automatically credited to the prisoner and may be forfeited only upon the commission of a disciplinary infraction. *See, e.g.*, NEB. REV. STAT. § 83-1,107 (Reissue 1976). In other jurisdictions the prisoner must earn his good time credits. *See, e.g.*, M.S.C.A. § 3-501, Comment.

4. Reed v. Parratt, 207 Neb. 796, 301 N.W.2d 343 (1981). Reed sought declaratory relief, claiming a violation of both his constitutional rights and the rules of the Department of Correctional Services, and an expungement of matters relating to the disciplinary action.
5. *Id.* at 797, 301 N.W.2d at 344. The APA judicial review provisions are located in NEB. REV. STAT. §§ 84-917 to -919 (Reissue 1976). For a recent article discussing the APA, see Willborn, *A Time For Change: A Critical Analysis of the Nebraska Administrative Procedure Act*, 60 NEB. L. REV. 1 (1981).
6. 207 Neb. 796, 301 N.W.2d 343 (1981).
7. *Id.* at 799, 301 N.W.2d at 345. Judge Brodkey joined in the dissent.
8. NEB. REV. STAT. §§ 83-4,109 to -4,123 (Reissue 1976).
9. *Id.* § 83-4,111.
10. *Id.* § 83-4,111(2).

The rules adopted specifically are required to be filed pursuant to procedures set forth in the Nebraska APA.[11] The APA procedures require public hearings on the proposed rules[12] and submission of the proposed rules to the attorney general for consideration as to their legality and constitutionality.[13] The Department, which conceded during oral argument in the *Reed* case the applicability of the APA rulemaking procedures to the adoption of correctional department rules,[14] did in fact comply with these procedures.

The prison disciplinary procedures statute also governs the hearing procedures that apply in prison disciplinary actions, including an action, such as that instituted against Reed, in which good time credit may be lost.[15] These procedures include, generally, the opportunity for a prisoner to testify at the hearing, to present evidence and witnesses, and to question persons called to testify by the hearing officer. The prisoner also is entitled to a written statement of the basis for a decision against him.[16] These hearing procedures are fairly comprehensive and, when different from the APA hearing procedures applicable to state agencies generally,[17] certainly override the APA procedures.[18]

If the issue in *Reed v. Parratt*, then, were the applicability to a prison disciplinary hearing of the Nebraska Administrative Procedure Act's hearing requirements, I would agree with the *Reed* majority that the specific prison disciplinary procedures statute was intended by the legislature to, and does, in fact, control over the

11. *Id.* § 83-4,112.
12. NEB. REV. STAT. § 84-907 (Cum. Supp. 1980).
13. NEB. REV. STAT. § 84-905.01 (Reissue 1976).
14. 207 Neb. at 800, 301 N.W.2d at 345-46 (Krivosha, C.J., dissenting).
15. NEB. REV. STAT. § 83-4,122 (Reissue 1976). These procedures also apply if the potential sanctions involve isolation or a change in program assignment. *Id.*
16. *Id.*
17. *Id.* § 84-913. Section 84-913 of the Nebraska APA requires that in a contested case before an agency all parties be afforded an opportunity for hearing after reasonable notice as defined in that section. It affords parties a right to present evidence and argument. It also requires that an official record be kept of the hearing and that an agency adopt rules of procedure in contested cases. *Id.* The Nebraska APA also requires an agency in a contested case to give effect to evidence, recognize privileges, administer oaths, and afford both the right of cross-examination and the right to submit rebuttal evidence. *Id.* § 84-914.
18. Many of the hearing procedures are common to both statutes. *Compare* NEB. REV. STAT. §§ 83-4,120 to -4,122 (Reissue 1976) *with* NEB. REV. STAT. §§ 84-913 to -915 (Reissue 1976). The major differences between the statutes are that under the APA, but not under the prison disciplinary statute, a party is provided the absolute right of cross-examination, NEB. REV. STAT. § 84-914(4) (Reissue 1976), and the right to require agency compliance with the rules of evidence. *Id.* § 84-914(1).

general APA provisions. But the question in *Reed* did not concern the procedures applicable to a prison disciplinary hearing; instead, the *Reed* court was faced with deciding whether judicial review of the disciplinary committee decision was available under the APA.

As to this question, there is nothing of comparable specificity in the prison disciplinary statute to compel a finding that the APA judicial review provisions, like those governing the hearing procedures, are preempted. In fact, the only language in the prison disciplinary procedures statute that addresses review merely provides that "any review of disciplinary action imposed upon any person shall be pursuant to the provisions of section 83-4,109 to 83-4,123 [prison disciplinary proceedings]."[19] This language need not, and indeed, I would say, should not, be interpreted to preclude judicial review and thus to override applicability of the plain language of the APA,[20] at least not when there is another, equally reasonable interpretation possible.

The more appropriate act of statutory interpretation is one that attempts to harmonize two statutes rather than find them in conflict. A harmonizing reading, entirely consistent with the language of the prison disciplinary procedures statute, would hold that statute applicable, not to judicial review, but only to the internal prison review mechanisms that should be exhausted before resort to the courts. As the Chief Justice wrote:

> Those specific sections [sections 83-4,109 to -4,123 (Disciplinary Procedures in Adult Institutions)] simply prescribe the procedures under which the hearings before the prison boards shall be conducted in the first instance. That is, in effect, no different than a host of other sections in our statutes prescribing procedures to be followed by various agencies in the first instance. The internal review of disciplinary action may very well, in the first instance, be pursuant to the provisions of §§ 83-4,109 to 83-4,123. One can very easily harmonize the provisions of §§ 83-4,109 to 83-4,123 and the provisions of §§ 84-901 to 84-919 [APA], the former applying to hearings before the agency and the latter applying to appeals before the court from the action of the agency. *They are not in any manner inconsistent or contrary one to the other.*[21]

This interpretation finds support in the final section of the prison disciplinary procedures statute. This section, "Access to Courts

19. *Id.* § 83-4,115.
20. For the specific APA language, see text accompanying note 33 *infra*.
21. 207 Neb. at 801, 301 N.W.2d at 346 (Krivosha, C.J., dissenting) (emphasis added). This construction conforms more closely than the majority's to the rule of statutory construction requiring that statutes *in pari materia* be construed together in an effort to uphold both. *See, e.g.*, BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 104 (2d ed. 1911). For an example of a legislature providing specific and preemptive statutes to govern prison hearing procedures while providing judicial review of the prison decision under its general APA, see Penn v. Department of Corrections, 100 Mich. App. 532, 538-39, 298 N.W.2d 756, 758-59 (1980).

and Legal Assistance Unrestricted,"[22] mandates a construction of the prison disciplinary procedures statute that does not "restrict or impair an inmate's free access to the courts and necessary legal assistance in any cause of action arising under [the disciplinary procedures provision]."[23] The import of this section is that the disciplinary procedures statute is not a legislative attempt to control prisoner access to the courts over matters raised at prison disciplinary hearings. Thus, in common with Chief Justice Krivosha, I think the specific statutory disciplinary sections governing prison hearings do not prevent, nor were they intended to prevent, a prisoner's access to the courts under the otherwise applicable APA.[24]

The Nebraska Administrative Procedure Act[25] applies to agency activities. "Agency" is defined as a "board, commission, department, officer, division, or other administrative office or unit of the state government authorized by law to make rules."[26] Specifically exempted from the definition are the Adjutant General's Office, the courts, and the legislature—but not the Department of Correctional Services.[27] Under the APA, a rule is defined, in pertinent part, as "any rule, regulation, or standard issued by an agency, . . . designed to implement, interpret, or make specific the law enforced or administered by it . . . and for the purpose of this act every rule which shall prescribe a penalty shall be presumed to have general applicability or to affect private rights and interest."[28] There is no basis for an argument that the consequences to Reed arising from the prison disciplinary hearing (loss of all accumulated good time and confinement to the Penal Adjustment Center for six months) do not constitute a penalty affecting private rights within the statutory definition.[29] Thus, it is clear, and nothing con-

22. NEB. REV. STAT. § 83-4,123 (Reissue 1976).
23. *Id.*
24. I do not wish to sound disingenuous here. I realize, of course, that the legislature may not have considered the relationship between the two statutes. Even if it did, its statutory resolution most assuredly does not reflect a single, uniform reason for the votes cast by individual senators. What I do suggest is that within constitutional limits the legislature is free to provide any statutory scheme it wishes (or to provide a scheme while neither wishing nor trying). The court's function is not to substitute its own judgment of wise policy but to effectuate the statutory mandate consistent with the legislative intent—so far as the court is able to interpret that intent.
25. NEB. REV. STAT. §§ 84-901 to -919 (Reissue 1976 & Cum. Supp. 1980 & Supp. 1981).
26. *Id.* § 84-901 (Supp. 1981).
27. *Id.*
28. *Id.* § 84-901(2) (Reissue 1976 & Supp. 1981).
29. In addressing the Nebraska statutory language, the majority in *Reed* made no real attempt to demonstrate its view of the inapplicability of this definition to Reed's situation beyond a one-sentence allusion to an APA proceeding as involving "the rights or privileges of members of the general public and . . . not

tradictory appears in the *Reed* opinion, that the Department of Correctional Services is an agency for purposes of the APA.[30] Certainly, if the legislature intended to exempt the department from the APA requirements for all or selected purposes, it could have effected that intent by clear and unequivocal language.[31]

Under the Nebraska APA judicial review of an agency decision is available.[32] Specifically:

> Any person aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, is entitled to judicial review under sections 84-917 to 84-919. Nothing in this section shall be deemed to prevent resort to other means of review, redress, or relief provided by law.[33]

It strikes me, therefore, that the plain language of the APA,[34] and particularly the sections on judicial review, make the Act applicable to prison disciplinary hearings. Indeed, nothing in the *Reed* majority opinion appears to dispute Reed's claim that he was a "person aggrieved by a final decision"[35] under the APA. In common with Chief Justice Krivosha I believe that the plain, clear, and unambiguous APA language providing judicial review is not overridden by any equivalent plain, clear, and unambiguous language in the prison disciplinary procedures statute that can be read to deprive prisoners of judicial review.

I would not be heard to suggest, however, that statutory plain language, even when spoken in absolute terms, should be construed without regard to legislative policy. Statutory interpretation requires an understanding and appreciation both of the context out of which the statute derives and of the purposes sought to be achieved by the legislature when enacting the statute.[36] Legislative interpretation, therefore, necessarily requires an evaluation of the legislative policy giving rise to the statutory language. For example, a statute may be enacted that makes driving

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related to the internal operation of an institution." 207 Neb. at 978, 301 N.W.2d at 345.

30. See text accompanying notes 12-14 *supra*.
31. *Cf.* Rusk v. Cort, 369 U.S. 367 (1962) (Congressional intent must be shown to preclude judicial review of administrative decisions); Cofone v. Manson, 594 F.2d 934, 938 (2d Cir. 1979) (Department of Corrections explicitly exempted from certain requirements of Administrative Procedure Act).
32. NEB. REV. STAT. §§ 84-917 to -919 (Reissue 1976).
33. *Id.* § 84-917(1).
34. Chief Justice Krivosha described the provisions as stating their terms "clearly and unequivocally." 207 Neb. at 800, 301 N.W.2d at 346 (Krivosha, C.J., dissenting).
35. NEB. REV. STAT. § 84-917 (Reissue 1976). The *Reed* majority did decide, however, that a prison disciplinary hearing is not a "contested case." For a discussion of this aspect of the opinion, see text accompanying notes 42-45 *infra*.
36. *See, e.g.*, 25 RULING CASE LAW, Statutes § 230 (1919); J. SUTHERLAND, STATUTORY CONSTRUCTION § 363 (2d ed. 1904).

above posted speed limits a misdemeanor and by its language apparently admits of no exceptions in any circumstances. Such a statute legitimately could be read, and in terms of projected legislative policy undoubtedly should be read, to exclude from the scope of its coverage a police officer who speeds in pursuit of a suspect.[37] The legislative intent, however unqualified the language employed, was to deter speeders, not law enforcers enforcing the law.

Of course, it forcefully could be argued that legislation should be construed narrowly with plain language read as drafted. Narrow construction should encourage a legislature to draft carefully, to know what it wants to say, and to say it clearly and accurately. Ideally, the legislature would anticipate types of situations falling outside the intended scope of a statute and expressly exclude them. To return to my example, the need for an exception for course-of-duty police speeding in a misdemeanor speed statute *is* one that readily may be anticipated. That being so, the statute easily could be drafted to include a law enforcement exception. If such narrow construction were applied to the applicability of the APA judicial review sections to prison hearings, the *Reed* court would have had to find APA judicial review available to prisoners. The Act, after all, admits of no exceptions.

It nonetheless is appropriate, for many reasons, for a court to consider underlying policy in interpreting statutory language. First, not every situation which the legislature would intend to exclude from the scope of a statute may be readily anticipated. Second, even if a legislature were gifted with the prescience to anticipate all such situations and the ability to draft around them, the legislative process does not afford the time to achieve such a result in each bill before the legislature. Third, statutes would become much more complex and lengthy, and unless legislatures acquired an ability that has so far eluded the rest of us, an ability to effect perfection, the interpretative problem still would not disappear.[38] Given the time constraints incumbent on legislative activ-

37. This is not to suggest that the best law enforcement policy is one that encourages high speed chases or that the legislature, by not including such conduct within the scope of the misdemeanor speed legislation, intends to condone or sanction the conduct. It is merely to suggest that, however blanket the language in the legislation with respect to speeding, the best projection as to legislative intent would be that an on-duty police officer in the course of his duties was meant to be excluded from coverage.

38. One example of the difficulty of legislative drafting is represented by the construction problems related to the legislative interpretation rule of *ejusdem generis*. *See* Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 405 (1950).

ity, the political context and the ready give and take in which a legislature operates, and its inability to achieve drafting perfection,[39] the judiciary must at times act interstitially to assure fulfillment of the legislative policy. As Llewellyn stated:

> [The court must] . . . take the music of any statute as written by the legislature; it must take the text of the play as written by the legislature. But there are many ways to play that music, to play that play, and a court's duty is to play it well, and in harmony with the other music of the legal system.[40]

Thus, although I disagree with the *Reed* majority with respect to the plain language of the APA and its relationship to the prison disciplinary procedures statute, I do believe that, to the extent the majority found ambiguity in the relationship of the two statutes,[41] it appropriately resorted to an evaluation of the underlying legislative policy. Unfortunately, once the majority considered underlying policy, it incorrectly evaluated that policy and did not play it "in harmony with the other music of the legal system." An examination of underlying policy, including the long and firmly held policy in support of the need for and efficacy of judicial review, absolutely compels a resolution of any ambiguity in favor of the applicability of judicial review under the APA.

III. *REED* MAJORITY AND JUDICIAL REVIEW

The *Reed* majority decided that the statutory prison disciplinary procedures by their import, if not by direct language, make the APA inapplicable to judicial review of prison hearings. It rejected the applicability of the APA judicial review sections to prison hearings primarily on the theory that a prison disciplinary hearing is not a "contested case" within the meaning of the APA. The majority appears to have so concluded because a prisoner at such a hearing is not entitled to all, or even most, of the rights afforded a defendant at a criminal trial.[42] This is without doubt true but, with due deference to the majority, hardly relevant: administrative hearings are not criminal trials and no one argues that they are. A petitioner at an administrative hearing is neither entitled to nor afforded all the rights of a criminal defendant;[43] prisoners

39. The art or task of legislative drafting is not a simple one. *See, e.g.*, DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING (1965).

40. Llewellyn, *supra* note 38, at 399.

41. In considering underlying policy and the relationship of the two statutes, the majority, somewhat anomalously I believe, found judicial review under the APA inapplicable to prison hearings, yet remanded for a district court determination whether judicial review would be available under the Nebraska Declaratory Judgment Act. *See* notes 114-24 & accompanying text *infra*.

42. 207 Neb. at 799, 301 N.W.2d at 345.

43. *See* 5 U.S.C. § 554 (1976); NEB. REV. STAT. §§ 83-913 to -914 (Reissue 1976);

before disciplinary boards are not unique in this respect. As defined in the Nebraska APA, a "contested case" is "a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing."[44] Chief Justice Krivosha, in evaluating whether Reed's was a contested case, found it "clear beyond question that the order of the appeal board which found Reed guilty of escape and ordered that he lose all previously acquired good time and spend 6 months in the Nebraska Penal Complex Adjustment Center is a penalty and does, indeed, affect private rights."[45] Thus, a finding that a "contested case" exists is not dependent on an examination of the degree to which the agency hearing resembles a criminal trial. A contested case depends, instead, on the nature of the deprivation and, presumably, the adversarial nature of the proceeding.

The majority in *Reed*, however, while appearing to admit that a prison disciplinary hearing is adversarial and that private rights are affected by a disciplinary board decision,[46] nonetheless ignored the applicability of the APA.[47] The majority cited the United States Supreme Court decision in *Wolff v. McDonnell*[48] as demonstrating that only minimal due process rights are required at prison disciplinary hearings.[49] The United States Supreme Court in *Wolff*, however, was describing minimal rights afforded by the Constitution of the United States, and not what it considered to be wise legislative policy. In fact, in *Wolff* itself the Court left to legislative determination the appropriate scope (beyond the constitutional minimum) of due process rights that can be provided at a disciplinary hearing without risk to security or other legitimate state interests.[50] *Wolff* provides a statement by the United States Supreme Court that beyond describing constitutional minima a federal court is an inappropriate[51] tribunal to weigh competing in-

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Meyers & Rabiej, *Burden of Proof and the Standard of Judicial Review in Prison Disciplinary Hearings Involving Decisions Predicated Upon Uncorroborated Hearsay Evidence*, 1979 S. ILL. U.L.J. 535, 540 & n.18.

44. NEB. REV. STAT. § 84-901(3) (Supp. 1981). *See* Lawrence v. Department of Corrections, 88 Mich. App. 167, 276 N.W.2d 554, *appeal denied*, 407 Mich. 909 (1979).
45. 207 Neb. at 801, 301 N.W.2d at 346 (Krivosha, C.J., dissenting). *See* note 29 *supra*.
46. For an explanation of why good time forfeiture is a substantial deprivation to a prisoner, see note 69 *infra*.
47. 207 Neb. at 799, 301 N.W.2d at 345.
48. 418 U.S. 539 (1974).
49. 207 Neb. at 798, 301 N.W.2d at 345.
50. *Id.*
51. If not incompetent in a constitutional sense. *See generally* Berger, *Paul Brest's Brief for an Imperial Judicary*, 40 MD. L. REV. 1 (1981).

terests and to determine wise policy in a state prison setting.[52] Properly stated, that is a legislative function. Chief Justice Burger described this difference in yet another prison case,[53] one concerning unionization by prisoners:

> This is but another in a long line of cases in the federal courts raising questions concerning the authority of the States to regulate and administer matters peculiarly local in nature. Too often there is confusion as to what the Court decides in this type of case. The issue here, of course, is not whether prison "unions" are "good" or "bad", but rather, whether the Federal Constitution prohibits state prison officials from deciding to exclude such organizations of inmates from prison society in their efforts to carry out one of the most vexing of all state responsibilities—that of operating a penalogical institution. In determining that it does not, we do not suggest that prison officials could not or should not permit such inmate organizations, *but only that the Constitution does not require them to do so.*
>
> . . . The federal courts, as we have often noted, are *not equipped by experience or otherwise to "second-guess" the decisions of state legislatures* and administrators in this sensitive area . . . .[54]

Had the task requested of the Nebraska Supreme Court in *Reed* been to describe a right of prisoner appeal as a matter of Nebraska constitutional law, the Nebraska court's refusal to act perhaps would have been appropriate.[55] But the *Reed* case is in a far different posture. The Nebraska Supreme Court was not asked to make its own policy choices in this "most vexing of all state responsibilities" but merely to carry out the judgment made by the legislative branch. The real question before the Nebraska court was whether, in the face of a substantial deprivation to a prisoner, the legislature through the APA afforded that prisoner more than the federal constitutional due process minima.

The Nebraska Supreme Court majority apparently believed that the Unicameral could not have chosen to make more formal the prison disciplinary hearing because more formal hearings generally take more time to complete. The court found that these hearings, traditionally summary in nature, must be conducted expeditiously if security and safety at the prison are to be assured.[56]

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52. On the difference between what is mandated by the United States Constitution and what, although perhaps wise policy, is not mandated, see Ferguson v. Skrupa, 372 U.S. 726, 729-30 (1963).
53. Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977).
54. *Id.* at 136-37 (Burger, C.J., concurring) (emphasis added).
55. Yet, even here, the *Wolff* Court's disinclination, indeed, lack of power, as a *federal* court to dictate *state* policy is no bar to a state court deciding to act. For an example of a state court's willingness to interpret its state constitution to mandate court intervention in the prison context, see Monks v. New Jersey State Parole Bd., 58 N.J. 238, 277 A.2d 193 (1971).
56. A *contra* argument may be made with respect to how best to assure prison safety and security: hearings granting prisoners a greater voice and a better opportunity to be heard may impart a sense of institutional fairness that will

As noted previously,[57] however, the prison hearing procedures themselves are not at issue in *Reed*. The legislature, perhaps reflecting the concern for expedition addressed by the court, did provide specifically for curtailed prison hearing procedures alternative to, and arguably providing a quicker result than, those prescribed in the APA.[58] And I have no doubt that the proper result, at least for purposes of statutory interpretation, is that these specific prison procedures control over those in the APA governing agency hearings. The issue in *Reed*, however, was merely whether a court may review the final agency decision according to APA requirements for judicial review. In this situation, the opportunity for judicial review would not affect adversely the nature of the hearing conducted before the disciplinary board or contribute in any way to a more unwieldy or "unmanageable" hearing.

On the other hand, judicial review might well contribute to making these hearings more objectively fair.[59] Let us for the moment accept the court's view of a legislative judgment that prison hearings must be conducted informally and quickly. There is nothing inconsistent with that policy in a legislative judgment to provide prison hearing procedures alternative to those of the APA while yet maintaining judicial review of the final decision reached. In its decision, however, the *Reed* court created the anomaly of a state agency whose rules must be, and were, adopted according to APA procedures but whose hearings applying those rules are exempt from the judicial review provisions of the APA. The *Reed* majority opinion thus appears to leave open the possibility that rules required to be adopted under APA procedures to assure reasonableness and fairness may be avoided in application at a prison hearing—with no court review available to require compliance.[60]

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relieve tensions and offset a tendency to rely on illegal and unsanctioned ways to convey grievances.

57. See text accompanying notes 17-24 *supra*.

58. The curtailed prison hearing procedures, whether or not they assure shorter hearings, do decrease the opportunity for what many prison administrators see as unseemly conflict between the prisoner and the prison administration. One example of such a "conflict" is a prisoner cross-examining guards and other employees of the Department of Correctional Services who testify against him.

59. For a discussion of the effect of judicial review on the conduct of a hearing, see text accompanying notes 63-65 *infra*.

60. Reed likely was not injured by an inability to obtain court review of the disciplinary hearing decision. The facts underlying the offense for which he was charged and sanctioned at the prison were also litigated at his criminal trial. There he was found guilty, under a far higher burden of proof than obtained at the disciplinary hearing and with a full panoply of due process and sixth amendment rights. That verdict was reviewed and affirmed on appeal. State v. Reed, 205 Neb. 45, 286 N.W.2d 111 (1979).

IV. ADVANTAGES OF JUDICIAL REVIEW

There is no federal constitutional right to appeal, even from a conviction in a criminal case.[61] Yet the federal system chose by statute to permit appeals in both civil and criminal cases,[62] and every state in the nation, whether by state constitution or statute, likewise permits appeals from final decisions by courts of original jurisdiction. Similarly, agency action under the APA is subject to review by a court. Judicial review of decisions by the initial trier of fact, whether the trier of fact is a court or an agency, is, and always has been, a commonplace of the American legal system. Recognition that court review protects important values in a system of laws explains its position of prominence.

Institution of an appellate process is not a jurisdiction's declaration that its triers of fact are always or regularly unskilled in the law, ignorant, biased, or arbitrary or capricious. Nor is a provision for judicial review an expression of mistrust in the system by the drafters of constitutions and statutes. Institution of a right of judicial review is a practical recognition that nothing and no one is perfect, that occasionally errors are made even in the best of all possible worlds. Judicial review, then, does not imply a judgment that the factfinder is always or even frequently in error, but, rather, judicial review provides a mechanism for correcting those errors that do occur.

Further, our legal system was created and is designed to protect the individual against governmental excesses, whether real or potential. Imposition of judicial review thus provides a routinized process for overseeing the governmental system to prevent such excesses.

An appellate process of review, conducted by an impartial and objective court, has an additional and perhaps less obvious benefit. It cogently can be argued that the mere existence of a review process carries with it a better assurance of diligence in the trier of fact, whether a judge or agency hearing officer, to conduct an objectively fair hearing. The trier of fact, knowing his decision is subject to scrutiny by a reviewing court, will have additional incentive to exercise discretion in a fair, well-reasoned fashion and to furnish a record that will demonstrate the same.[63] In fact, affording due deference to agency expertise while providing an opportunity for judicial oversight of an agency decision is the foundation upon which

61. *E.g.*, McKane v. Durston, 153 U.S. 684, 687 (1894).
62. 28 U.S.C. §§ 1252-1254, 1257-1258 (1976) (Supreme Court appellate jurisdiction); 28 U.S.C. § 1291 (1976) (Courts of Appeals appellate jurisdiction).
63. *See generally* K. DAVIS, ADMINISTRATIVE LAW § 16, at 12 (Supp. 1970); K. DAVIS, DISCRETIONARY JUSTICE (1969).

administrative law rests.[64]

As was aptly said in the context of search and seizure law, judicial oversight "should be viewed with an appreciation that to exclude any particular . . . activity from coverage is essentially to exclude it from judicial control and from the command of reasonableness, whereas to include it is to do no more than say that it must be conducted in a reasonable manner."[65] Surely the minimal standard to which we should hold those who operate our correctional facilities is that minimal standard to which we hold trial courts and virtually all other agencies—that they operate reasonably. As members of the society that placed prisoners under their control, we have an obligation to assure reasonable and fair treatment and, through judicial review, we can make great strides toward living up to that obligation. It is difficult to believe that anyone, whether legislature or court, would gainsay a prisoner's opportunity to avail himself of court review.

I am not arguing here for an elimination of administrative discretion in correctional authorities. I recognize that administrators must be vested with a good deal of discretion to allow them properly to discharge their responsibilities. Correctional authorities have more expertise than the courts with respect to the management, external safety, and internal security needs of a prison. Deference to that expertise is appropriate: deference to agency expertise is, after all, an important underpinning of administrative law. But appellate review has never meant that the appellate tribunal substitutes its judgment for that of the original decisionmaker. This is particularly true for review under the APA where a court may overturn an agency decision only if that decision is unconstitutional, is outside the boundaries of agency statutory or procedural authority, demonstrates an error of law, is unsupported by substantial evidence, or is arbitrary or capricious.[66] Under the APA, therefore, heavy deference is paid to the initial agency determination.[67] Nonetheless, the opportunity is available, on this nar-

64. *See, e.g.*, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 179-81 (1967); NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 555, Standard 16.2 (1973). *See generally* K. DAVIS, DISCRETIONARY JUSTICE (1969).

65. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 393 (1974).

66. NEB. REV. STAT. § 84-917(6) (Reissue 1976).

67. Deference is given not merely because the trier of fact has the opportunity to see and hear witnesses firsthand (and thus is in a better position to judge credibility than is the reader of a cold record) but because agency expertise is afforded great weight.

row standard of review, to right any wrongs that advertently or inadvertently occur.

Deference to agency expertise, however, is not equivalent to an abdication of all responsibility to oversee agency decision-making. While an agency is closest to the needs and problems associated with its efficient functioning, that same closeness may on occasion make the agency decision-maker oversensitive to agency needs and problems in an attempt to make it easier to run an efficient operation. In the correctional setting this oversensitivity may be complicated by a tendency on the part of a prison hearing board to keep correctional staff satisfied if a decision adverse to its position at a disciplinary hearing may be interpreted by staff as a lack of confidence or support.[68] An objective review body can assure that a proper balance is maintained.

The need for an objective review is a particular necessity when the agency involved is a department of corrections. Violence in prisons is not an unusual circumstance. Every year in this country we are faced with prison riots and other disturbances occurring within prison walls. In a controlled setting, with little or no outlet to relieve pressure, what would be minor problems on the outside take on entirely new dimensions. The prisoner has nowhere else to go and no real ability to make his voice heard. He must deal with the people with whom he is placed—often frequently.

Admittedly, although not the situation with Reed,[69] many prisoner grievances are unimportant, even petty, in any objective comparative view of the nature and seriousness of various types of deprivations. Yet these grievances, if subject to court review, would still take up valuable, and generally limited, court time. The context out of which prisoner claims arise, however, must be remembered in evaluating the seriousness of these claims and the concomitant need to take up valuable court time for court review. As Chief Justice Burger cogently observed, the loss of even a few packs of cigarettes can be a major deprivation for a prisoner since

68. Oversensitivity to prison needs is accentuated when, as is the case with Nebraska prison disciplinary hearings, there is no requirement that the hearing officer be independent of the Department of Correctional Services. *See* NEB. REV. STAT. § 83-4,122(1) (Reissue 1976) (disciplinary boards to be appointed by the director of corrections who shall try to include on these boards a representative from the treatment or counseling staff).

69. Reed lost all accumulated good time as a result of the disciplinary hearing concerning his escape. An award of good time decreases the amount of time to be served; forfeiture of good time, then, effectively increases the prison term. In theory, since the prisoner is subject to serving the entire sentence imposed, forfeiture of good time is not viewed as increasing the sentence. Whether or not the loss of good time technically increases the time to be served, it may not be described as of little consequence to a prisoner.

a prisoner most likely has limited funds from which to make purchases and limited access to sources of supply.[70] Because of the circumstances in which a prisoner finds himself, unresolved grievances that free citizens would denominate as petty frequently are not so perceived by a prisoner. What begins as a minor dispute involving one or a few prisoners can quickly accelerate into a much larger problem for the prisoner—and often for the prison and the outside society as well.

Until the 1960's the judiciary had a "hands-off" policy with respect to the consideration of prisoner legal claims outside the scope of habeas corpus.[71] Not surprisingly, the insulation resulting from this hands-off policy contributed to an unfortunate history of prisoner exploitation in American prisons.[72]

Happily, in recent years courts have been passing through the closed prison doors to assure the legality of what transpires there.[73] Correctional practices are being evaluated by courts in the light of legal and constitutional principles. In part, this reflects a natural and reasonable, if latecoming, decision to hold prison administrators to the same standard required of other governmental decision-makers. In part, however, the demise of the hands-off doctrine probably reflects an appreciation that the need for judicial review of official decision-making is even more striking in the volatile prison context than elsewhere.

It has been repeatedly well noted by courts and commentators that prison violence and related disturbances will continue to erupt unless effective ways are developed to diffuse tension and handle complaints.[74] Availability of court review, and the sense of

70. Burger, *Report on the Federal Judicial Branch—1973*, 59 A.B.A.J. 1125, 1128 (1973). *See* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 83 (1967). *See generally* N. MAILER, THE EXECUTIONER'S SONG (1979); THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA, ATTICA (1972).

71. *See, e.g.*, Cruz v. Beto, 405 U.S. 319, 321-22 (1972); Champagne & Haas, *The Impact of Johnson v. Avery on Prison Administration*, 43 TENN. L. REV. 275, 275 (1976); Turner, *Establishing The Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation*, 23 STAN. L. REV. 473, 503-04 (1971).

72. *See, e.g.*, ABA JOINT COMMITTEE ON THE LEGAL STATUS OF PRISONERS, STANDARDS RELATING TO THE LEGAL STATUS OF PRISONERS (Tent. Draft 1977), *reprinted in* 14 AM. CRIM. L. REV. 377, 460 (1977); C. RUSCHE & O. KIRCHHEIMER, PUNISHMENT AND SOCIAL STRUCTURE 42, 65 (1939); Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 947 (1970).

73. *See, e.g.*, Vitek v. Jones, 445 U.S. 480 (1980); Bounds v. Smith, 430 U.S. 817 (1977); Wolff v. McDonnell, 418 U.S. 539 (1974); Cruz v. Beto, 405 U.S. 319 (1972); Johnson v. Avery, 393 U.S. 483 (1969). *See generally* Champagne & Haas, *supra* note 71; Turner, *supra* note 71.

74. *See, e.g.*, Landman v. Peyton, 370 F.2d 135 (4th Cir. 1966), *cert. denied*, 388 U.S. 920 (1967); R. GOLDFARB & L. SINGER, AFTER CONVICTION 515-16 (1973); THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA,

fair treatment that court review imparts, is one way to diffuse tensions. This would seem to be a significant policy reason in support of judicial review.

Another policy reason for providing judicial review in Nebraska on the narrow grounds of the state's APA is to preserve the state's voice in representing its interest in the fair and efficient operation of its prison system. Prisoners in many of the cases that would be heard under APA judicial review will also have a potential right of access to the federal courts through federal habeas corpus[75] or section 1983 actions.[76]

Federal habeas corpus is available to test prison decisions affecting the duration of a prisoner's sentence (such as the loss of good time) while section 1983 actions are available to raise claims with respect to the conditions of confinement.[77] Each year more of these cases are heard in the federal courts.[78] Today it is "almost

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supra note 70, ch. 2; NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, *supra* note 64, at 57. Thus, prisons have developed formalized grievance procedures and other processes, both formal and informal (including oversight by an ombudsman), to assure prisoners the opportunity to be heard. Decisions substantially affecting the lives of prisoners result in hearings at which minimal due process rights attach. Vitek v. Jones, 445 U.S. 480 (1980); Wolff v. McDonnell, 418 U.S. 539 (1974); Procunier v. Martinez, 416 U.S. 396, 404-05 (1974). *But cf.* Meacham v. Fano, 427 U.S. 215 (1976) (lack of hearing prior to transfer of prisoners from one institution to another does not violate the due process clause where state law does not create expectancy of hearing).

75. The statutory grant of federal habeas corpus jurisdiction for federal prisoners is 28 U.S.C. § 2241 (1976); for state prisoners it is 28 U.S.C. § 2254 (1976). A procedural alternative to habeas corpus, a motion to vacate the sentence, 28 U.S.C. § 2255 (1976), was provided to federal prisoners in 1948. This procedure must be used in lieu of the writ of habeas corpus unless it is "inadequate or ineffective." *Id. See* Swain v. Pressley, 430 U.S. 372, 378 n.10 (1977).

76. The Civil Rights Act, 42 U.S.C. § 1983 (1976).

77. Preiser v. Rodriguez, 411 U.S. 475, 489 (1973). The appropriate habeas corpus remedy is release from an unconstitutional incarceration. *Id.* at 484. Challenges to the conditions of confinement, for which the prisoner may seek damages, are § 1983 claims. *Id.* at 489. The line of demarcation is not completely clear, however. A prisoner who may not seek restoration of good time credits in a § 1983 action (since this affects sentence duration) may nonetheless seek a declaratory judgment concerning the legality of the procedure under which good time was lost. Wolff v. McDonnell, 418 U.S. 539, 554-55 (1974). Perhaps a more significant difference between § 1983 and federal habeas corpus petitions is that presentation of a claim on federal habeas corpus requires exhaustion of remedies. *See, e.g.*, Fay v. Noia, 372 U.S. 391 (1963); *Ex parte* Hawk, 321 U.S. 114 (1944); Reid v. Jones, 187 U.S. 153 (1902); New York v. Eno, 155 U.S. 89 (1894); *Ex parte* Royall, 117 U.S. 241 (1886). Section 1983 actions do not require exhaustion. Wolff v. McDonnell, 418 U.S. 539 (1974); Preiser v. Rodriguez, 411 U.S. 475 (1973).

78. *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 50 (2d ed. 1973) & 233-34 (Supp. 1981).

customary in this country for social reform to find its way into the federal courts and for the reaction against that reform to take shape in diatribes against the intervention of federal courts. Prison reform is simply another example of this phenomenon."[79] If the state legislature and courts want a voice in assuring that proper weight is given to the state's interests in disputes between prison and prisoner, then the most efficacious way of doing this is to provide review, in a *state* court, of the prison administrative action.

State court review will not, of course, foreclose the prisoner's access to federal court on a federal claim in the event that the state court decision does not satisfy him. But the state court decision, particularly in light of any findings of fact the state court may make, may have an estoppel effect on the subsequent federal court proceedings. In the context of a state fourth amendment suppression hearing, for example, the United States Supreme Court recently held that state court findings on the question of the constitutionality of the search may be conclusive on a federal court faced with a section 1983 damages action against the state law enforcement officers who conducted the search.[80] In reaching its decision, the Court found an absence of congressional intent in section 1983 to restrict or avoid traditional estoppel doctrine as well as an absence of any "generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate the right in a federal district court."[81] Thus, in *Reed*, the Nebraska Supreme Court, by declining to permit judicial review under the APA, in effect may have placed in the federal courts the first and only opportunity for review of a state correctional decision governing treatment of prisoners in a state institution.

This is a most unfortunate policy result. A state should at least attempt to resolve its own problems. A state system of judicial review should preclude federal court involvement in state issues affecting federal rights except as a last resort and then only in situations in which the state has failed to protect those rights. The legislature would probably agree that the preferred state policy is one in which a state rather than a federal court reviews the decision-making process of a state correctional facility.

One arguably advantageous effect of the *Reed* decision is that in turning away these prison cases the state courts might experience an alleviation, or at least not an increase, in any docket manage-

79. McCormack, *The Expansion of Federal Question Jurisdiction and the Prisoner Complaint Caseload*, 1975 WIS. L. REV. 523, 523.
80. Allen v. McCurry, 449 U.S. 90 (1980).
81. *Id.* at 103.

ment difficulties.[82] But this is an advantage paid for at the cost of avoiding a legal responsibility of review in an area where the state interest is great and where state control over the operation of its prisons would seem to be advisable if not necessary.[83] It is an advantage paid for not by avoiding the intrusion in prison administration that the court finds implied in judicial review but merely by transferring that reviewing obligation to federal courts. Review by these courts, perhaps less sensitive than state courts to state institutional needs, may render the intrusion more apparent, and more drastic.[84]

V. APA PRISONER APPEALS IN OTHER JURISDICTIONS

In its discussion of prisoner appeals under the Nebraska APA, the *Reed* majority offered one other ground for its refusal to hold the judicial review sections of the APA applicable to prison hearings: it was unable to find even one court that had held its jurisdiction's general APA applicable to its prisons.[85] The absence of supporting precedent in this area, even if true,[86] must be treated with caution. First, as the court correctly noted,[87] there are few cases dealing with the applicability of administrative procedure acts to prisons. In fact, the court was able to discover only one case, *Lesser v. Humphrey*,[88] holding an APA *in*applicable to prison hearings. One case, particularly one decided over thirty years ago

82. Whether the state court docket will be lighter because prisoner cases will not be heard depends in part on what the court in *Reed* meant by its allusion to the possibility of hearing claims like Reed's under the Nebraska Declaratory Judgment Act. 207 Neb. at 799-800, 301 N.W.2d at 345-46. For a discussion of this aspect of *Reed*, see text accompanying notes 114-29 *infra*.

83. *E.g.*, Preiser v. Rodriguez, 411 U.S. 475, 491-92 (1973):

> It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons . . . . [Prison litigation] is most efficiently and properly handled by the state administrative bodies and state courts, which are, for the most part, familiar with the grievances of state prisoners and in a better physical and practical position to deal with those grievances.

84. I am not suggesting bias on the part of either the state or federal courts but merely a potential difference in emphasis permissible, indeed unavoidable, in a factfinder. A nonunanimous jury verdict is a good example of this phenomenon. Each factfinder brings his own particular perspective, based on training, background, and predilection, to his factfinding task. In the context of a prison case, there may be a difference based on the state court's closer relation to state problems and interests. *See* Preiser v. Rodriguez, 411 U.S. 475, 491-92 (1973).

85. The court evidently was unwilling to start a trend itself.

86. This finding by the court is incorrect. For a discussion of relevant precedent in this area, see text accompanying notes 99-110 *infra*.

87. 207 Neb. at 799, 301 N.W.2d at 345.

88. 89 F. Supp. 474 (M.D. Pa. 1950).

at a time when administrative law was not as widely accepted and as generously treated as it is today,[89] is hardly overwhelming support for the *Reed* decision. The best that can be said of the caselaw as the court found it is that it left an open field in which the court could plow.

A second, and more telling, criticism is that the task before the court in *Reed*, and the federal district court in *Lesser*, was a matter of statutory construction. As Chief Justice Krivosha correctly pointed out,[90] the Nebraska Supreme Court in *Reed* had to view the Nebraska APA and decide what *that* statute required with respect to prisoner appeals. If the plain language of the Nebraska APA required judicial review,[91] then such review could not be avoided by finding that no other legislature had enacted similar legislation. Nevertheless, the Nebraska court, experiencing difficulty interpreting statutory language and intent, might well turn to court decisions in other jurisdictions and be persuaded by the policy considerations employed by those courts in interpreting statutory language similar to that of the Nebraska APA. But the key to the persuasive quality of such other decisions is the similarity of the statutory language at issue in each case. Any reliance on *Lesser* proves ill-advised for precisely this reason. At the time *Lesser* was decided a federal prisoner had no statutory right to an agency hearing prior to the forfeiture of good time.[92] The absence of this statutory right was crucial to a determination in *Lesser* of APA inapplicability to prisoner appeals because the APA there under review applied only to cases "required by statute to be determined on the record after opportunity for an agency hearing."[93] This language, according to the *Lesser* court,[94] did not include "those hearings which administrative agencies may hold by regulation, rule, custom, or special dispensation."[95] Since it was

89. At the time *Lesser v. Humphrey* was decided, for example, Nebraska's APA had been in effect only a few years and had been, and still is, undergoing substantial legislative change. *See* Willborn, *supra* note 5, at 1-3 & n.3. For a discussion of the expansion of administrative law, see generally Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971); L. JAFFE & N. NATHANSEN, ADMINISTRATIVE LAW, CASES AND MATERIALS (4th ed. 1976).

90. 207 Neb. at 801, 301 N.W.2d at 346 (Krivosha, C.J., dissenting).

91. The Chief Justice believes, as do I, that the APA does require judicial review. *Id.*

92. 89 F. Supp. at 476. *See* 18 U.S.C. §§ 4161-4166 (1952) (current version at 18 U.S.C. §§ 4161-4166 (1976)).

93. 5 U.S.C. § 1004 (1946) (Adjudications) (current version at 5 U.S.C. § 554 (1976)).

94. The *Lesser* court's interpretation of the APA language was based on the decision of the United States Supreme Court in Wong Yang Sung v. McGrath, 339 U.S. 33, 48 (1950).

95. 89 F. Supp. at 476.

through a prison rule, as "a matter of grace,"[96] that Lesser was afforded his hearing, he was not entitled to judicial review under the APA under consideration by the *Lesser* court.

Today, a prisoner facing forfeiture of good time at a prison disciplinary hearing is entitled, as a matter of constitutional due process, to a hearing at which he may present witnesses and evidence.[97] Consequently, the disciplinary action against Lesser perhaps would be reviewable today even under the specific APA language before the *Lesser* court.[98]

Lesser, therefore, offers no support for the *Reed* decision. It is thirty years old, and derives from an administrative concept and statutory and constitutional context no longer relevant to the precise issue before the Nebraska Supreme Court in *Reed*. The Nebraska Supreme Court found no other decisions in which APA applicability to prison hearings was considered. Michigan is one jurisdiction, however, that evaluated statutory language substantially similar to the Nebraska APA and held the judicial review provisions applicable to prison hearings.

In the prison context the Michigan courts three times[99] interpreted the language in the Michigan APA calling for "judical re-

96. *Id.*

97. Wolff v. McDonnell, 418 U.S. 539 (1974).

98. A reviewing court would have to determine that the statutory language "required by statute to be determined on the record" either (1) was meant to include hearings found constitutionally to be required by the United States Supreme Court, or (2) after *Wolff*, should be interpreted to include such constitutionally required hearings. This statutory construction is not inconceivable.

99. Parshay v. Buchkoe, 30 Mich. App. 556, 186 N.W.2d 859 (1971); Penn v. Department of Corrections, 100 Mich. App. 532, 298 N.W.2d 756 (1980).

In *Parshay* the prisoner, claiming infringement of his first amendment rights in speech and mail, sought to be heard through a complaint for mandamus. The court held that mandamus was inapplicable since the warden's actions involved an exercise of discretion. The court added that the prisoner could "test the validity or proper legal applicability of the rules and orders of the defendant as applied to him. Such action is provided by statute by the declaratory judgment as set forth in the Michigan Administrative Procedures Act." 30 Mich. App. at 559, 186 N.W.2d at 861. The action in *Parshay* had to be heard as a declaratory judgment under the APA because, unlike Reed, the prisoner had not sought a prison hearing and final determination by the warden before seeking judicial relief.

In *Penn* the plaintiff, a parolee, sought review under the Michigan APA of the parole board decision revoking his parole. The court reaffirmed that it was "beyond question that the department of corrections is an 'agency' for purposes of the APA." 100 Mich. App. at 536, 298 N.W.2d at 757. See text accompanying notes 101-03 *infra* for a discussion of the third case, Lawrence v. Department of Corrections, 88 Mich. App. 167, 276 N.W.2d 554, *appeal denied*, 407 Mich. 909 (1979).

view of a final decision or order in a contested case"[100] before an agency. *Lawrence v. Department of Corrections*[101] is the decision most directly on point to the facts in *Reed*. Lawrence sought review of a prison disciplinary decision resulting, among other things, in five days detention and reclassification to a higher security classification. The *Lawrence* court squarely held that a prison disciplinary hearing was a "contested case"[102] under the Michigan APA:

> The definition of a "contested case" is clear and unambiguous. The statutory provision in which we find it requires neither construction nor interpretation. Application of the plain language of the statute leads unalterably to the conclusion that a prison disciplinary hearing fits squarely within the terms of the definition. Such a hearing is certainly a proceeding in which the Department of Corrections is required to make a determination as to an inmate's legal rights, duties or privileges and there is no question that due process requires that the inmate be given an opportunity for an evidentiary hearing.[103]

The court held that since a prison disciplinary hearing is a contested case under the Michigan APA, Lawrence was entitled to judicial review of the disciplinary board decision.

The Court of Appeals for the District of Columbia evaluated substantially similar language in the federal APA[104] and similarly found APA judicial review applicable to prison hearings. Unlike Michigan, there is no single, clear decision on point. But when read together, two cases, *Pickus v. Board of Parole*[105] and *Ramer v. Saxbe*,[106] seem clearly to point to APA applicability. *Pickus* held the federal APA applicable to the Board of Parole and found that APA judicial review obtained.[107] *Ramer* held the APA applicable

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100. MICH. STAT. ANN. § 3.560(202) (1970).

101. 88 Mich. App. 167, 276 N.W.2d 554, *appeal denied*, 407 Mich. 909 (1979). Lawrence was found guilty of marijuana possession.

102. The Michigan statutory definition of "contested case" is: "A proceeding, including rate-making, price-fixing, and licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing." MICH. STAT. ANN. § 3.560(103) (Supp. 1981).

By comparison, the Nebraska APA definition of a contested case is: "A proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing." NEB. REV. STAT. § 84-901(3) (Supp. 1981).

103. 88 Mich. App. at 171, 276 N.W.2d at 556.

104. 5 U.S.C. § 702 (1976). This section provides that "a person . . . adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof." *Id.*

105. 507 F.2d 1107 (D.C. Cir. 1974).

106. 522 F.2d 695 (D.C. Cir. 1975).

107. The *Pickus* court found the APA judicial review provision applicable in a procedural setting in which the prisoner did not ask specifically for relief clearly

to prison rulemaking[108] and, in a footnote discussion, described the meaning and scope of the *Pickus* decision as

> deciding in effect that the Bureau of Prisons is an "agency" for the purposes of the APA; that its so-called "policies" or "guidelines" generally controlling the activities, conduct and discipline of persons under its custody or control could not be considered mere internal management policies, technical regulations, interpretive provisions or rules of agency organization, practice or procedure, but are subject to the notice or publication requirements of APA; and *that the district court had, and thus the appellate court has, subject matter jurisdiction by virtue of § 10 of APA, if not otherwise*.[109]

Thus, on substantially similar language, the Michigan and D.C. circuit courts found, *contra* to the Nebraska Supreme Court in *Reed*, that the APA judicial review sections apply to prison hearings. The dissimilarity in result between those two courts and the Nebraska court does not mean, of course, that they are correct and *Reed* is not. But these other decisions demonstrate that despite what the majority believed, the *Krivosha* dissent in *Reed* finds support in other court decisions.[110]

Furthermore, even in the absence of an applicable APA, the New Jersey Supreme Court was willing to find a right of prisoner appeal, from a parole board denial of parole, through exercise of that court's general, traditional, and constitutionally embodied prerogative writ jurisdiction.[111] Jurisdiction to review was found in the face of an arguably untimely petition for review.[112] The reasons given by the New Jersey court for its decision to intercede were that judicial review was necessary to assure fairness and prevent abuses of discretion in the parole board's performance of its discretionary duties.[113] Had the Nebraska Supreme Court afforded similar weight to the interests of fairness and prevention of arbitrary decision-making, the Krivosha dissent might have become the majority opinion. And properly so.

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within the auspices of APA judicial review. 507 F.2d at 1109-10. *See* 5 U.S.C. § 703 (1976).

108. The court noted that prison rules "affect and control daily activities, rights and disabilities in a special setting." 522 F.2d at 701.

109. *Id.* at 700-01 n.6 (emphasis added). Section 10 of the federal APA is the section granting entitlement to judicial review. *See* Pickus v. Board of Parole, 507 F.2d 1107, 1110 (D.C. Cir. 1974).

110. It is also true, at least as far as I was able to determine, that in neither Michigan nor the federal system is there a specific statute dealing with prison disciplinary hearings whose scope and meaning required harmonizing with the APA.

111. Monks v. New Jersey State Parole Bd., 58 N.J. 238, 248-49, 277 A.2d 193, 198-99 (1971). The arbitrariness claimed by Monks was the Board's refusal to provide him with a specific statement of reasons for his parole denial.

112. *See id.* at 242, 277 A.2d at 195. The court decided the merits without ever reaching the timeliness objection. *Id.*

113. *Id. See generally* K. DAVIS, DISCRETIONARY JUSTICE (1969).

VI. AFTER *REED*, WHAT DIRECTION REVIEW?

A. Declaratory Judgments

Reed v. Parratt, however wrongly decided, is now law in Nebraska. Absent legislative action, is there today any opportunity for state court review of a prison disciplinary action, or does *Reed* conclusively put beyond the reach of a Nebraska court prison hearing decisions that affect significantly the duration and quality of prison life? Certainly the primary policy consideration put forth by the majority to justify its decision—the need for speedy and informal resolution of prison hearings—should apply with equal force to court review whatever the statutory or procedural authority. In addition, if the majority correctly interpreted the legislative language and underlying intent of the Nebraska statute governing prison disciplinary hearings as precluding court review under the APA, then the specific language of that statute equally should override the opportunity for judicial review outside of the APA. Nevertheless, the *Reed* majority did not clearly foreclose all opportunity for review. Instead, it made an oblique reference to the possible availability of "declaratory judgment relief."[114]

Declaratory relief in Nebraska is available through the Nebraska Declaratory Judgment Act.[115] The majority opinion offers no guidance as to why a declaratory judgment may be available to petitioner Reed while APA judicial review is not. Although the Declaratory Judgment Act does not in terms require exhaustion of remedies, the Nebraska Supreme Court has held that:

> Proceedings for a declaratory judgment will not be entertained where *another equally serviceable remedy has been provided by law*, or where the resultant issue can be as well and speedily determined in ordinary proceedings open to the parties *or is within the exclusive original jurisdiction*

114. 207 Neb. at 799, 301 N.W.2d at 345. The court remanded to the district court for a determination of the applicability of declaratory relief. Whether a declaratory action is available, it appears that there is no other statutorily prescribed means of review. The Nebraska Post Conviction Act, NEB. REV. STAT. §§ 29-3001 to -3004 (Reissue 1979), for example, applies only to constitutional challenges to conviction and sentencing and not to legal challenges to what transpires at the prison unrelated to the criminal trial. For a thorough discussion and evaluation of the Act, see Hoffman, *Trial Court Responses to Claims for Relief Under the Nebraska Post Conviction Act: A Taxonomy*, 58 NEB. L. REV. 355 (1979).

115. NEB. REV. STAT. §§ 25-21,149 to -21,164 (Reissue 1979). The Act was adopted in 1929. Declaratory Judgment Act, 1929 NEB. LAWS 257. It is based on the NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM DECLARATORY JUDGMENTS ACT (1922), *reprinted in* 12 UNIFORM LAWS ANN. (1975). For an evaluation of relevant aspects of the Uniform Act, see Borchard, *The Uniform Act*, 34 HARV. L. REV. 697 (1921); Borchard, *Discretion to Refuse Jurisdiction of Actions for Declaratory Judgments*, 26 MINN. L. REV. 677 (1942).

of another tribunal or board.[116]

Nor will the court allow the Declaratory Judgment Act to substitute for a new trial or appeal.[117]

The effect of *Reed* is to find inapplicable to prison hearings "another equally serviceable remedy"[118] and thus to open to prisoners the possibility of declaratory relief that otherwise might be unavailable. Further, *Reed* may be seen as requiring that the same prison disciplinary statute that is exclusive as to original jurisdiction and acts as an absolute bar to APA judicial review may not be exclusive or act as a bar with respect to declaratory relief.

The *Reed* court may have left open the possibility of declaratory relief because it interpreted "review"[119] under the prison disciplinary statute as a word of art. A declaratory judgment action, even one in which a final prison hearing decision is under consideration, is an original action because it is a collateral attack. Thus, technically, a declaratory judgment action is not a "review" of an existing decision and may be outside the meaning of the prison disciplinary statute. In addition, the court might have believed that the statutory prison hearing procedures are not exclusive with respect to declaratory judgments since the final statutory section expressly reserves to a prisoner the right to "free access to the courts . . . in any cause of action arising under [the statute]."[120]

This reading of the statute makes consistent the *Reed* holding that APA judicial review is inapplicable to a prison hearing but declaratory relief possibly may not be. The statutory language can thus be harmonized—but the price of this harmony is inconsistency in terms of underlying policy. If court review is obtrusive, even dangerous, to the orderly and efficient administration of a prison (and therefore something that the legislature would want to avoid), then it will prove so whether it comes about through APA review or a declaratory judgment action.

There is, however, one rationale that would make this policy result consistent with the *Reed* holding. Perhaps the *Reed* majority believed that review under the Declaratory Judgment Act would

116. Strawn v. County of Sarpy, 146 Neb. 783, 786-87, 21 N.W.2d 597, 599 (1946) (emphasis added). *See* Scudder v. County of Buffalo, 170 Neb. 293, 102 N.W.2d 447 (1960); Phelps County v. City of Holdrege, 133 Neb. 139, 274 N.W. 483 (1937).

117. Phelps County v. City of Holdrege, 133 Neb. 139, 141, 274 N.W. 483, 484 (1937).

118. The Nebraska decisions with respect to exclusivity and exhaustion of remedies, *see* cases cited in note 116 *supra*, may be read narrowly as referring to remedies only and not encompassing any notion of the type of claim that may be heard or the particular court with jurisdiction to entertain the claim.

119. NEB. REV. STAT. § 83-4,115 (Reissue 1976). ("Any review of disciplinary action imposed upon any person shall be pursuant to the provisions of [the prison disciplinary procedures statute]"). *Id.*

120. *Id.* § 83-4,123.

be conducted on a standard even narrower than that available under the APA. As the *Reed* court said, review under the Declaratory Judgment Act will "necessarily be limited in nature since such an action is a collateral attack upon the decision of the disciplinary committee."[121] The *Reed* majority otherwise is silent as to the extent declaratory judgment review will permit a court to look into the factfinding process.[122]

Certainly collateral attack normally provides a more limited review of a decision than is available on direct appeal,[123] in part because of the availability of direct appeal to present claims. After *Reed*, however, no direct appeal is available to a prisoner challenging a prison board decision. The absence of an opportunity for direct appeal may, and indeed, I think, should, make the collateral attack review in this context broader than is generally available, equivalent to that review to which the prisoner would have been entitled under the APA. APA review, after all, is narrow enough, permitting a reversal or modification of an agency decision only if the decision is unconstitutional, illegal, outside agency authority or jurisdiction, clearly arbitrary, or unsupported by substantial competent evidence on the whole record on review.[124]

On the other hand, if the Nebraska court decides that declaratory relief, if available at all, requires a narrower standard than APA review, it may mean that the court will not review a prison hearing decision to assure that there was substantial, competent evidence supporting the decision.[125] That a court would not review for substantial evidence is troubling, particularly in light of the curtailed procedures and relaxed evidentiary rules that obtain at prison hearings, hearings in which uncorroborated hearsay may be the sole evidence presented.[126] The substantial evidence test, as compared to an arbitrary and capricious test, at least requires more than a "mere modicum" of evidence supporting the decision:[127]

> The critical difference [between the two standards of review] . . . is un-

121. 207 Neb. at 799, 301 N.W.2d at 345. The court's position is not quite so clear since it also attributed the limited nature of review to the fact that the issues at Reed's disciplinary hearing previously were litigated at the criminal trial.

122. The court similarly is silent as to the extent a declaratory action would be available to contest the validity of a prison rule or the adequacy of established prison procedures.

123. On the distinction between direct review and collateral attack, see RESTATEMENT (SECOND) OF JUDGMENTS §§ 4-9 (Tent. Draft No. 6, 1979). *See* Fauntleroy v. Lum, 210 U.S. 230 (1908).

124. NEB. REV. STAT. § 84-917 (Reissue 1976).

125. The remaining APA grounds for reversal or modification seem compelling and hardly of a nature to be avoided by a reviewing court.

126. *See, e.g.*, Meyers & Rabiej, *supra* note 43.

127. *Compare* Jackson v. Virginia, 443 U.S. 307, 320 (1979) *with* Consolidated

> derscored in the prisoner context by the comparative availability of written records of the proceedings on review. Whereas complete transcripts of hearings under the A.P.A. (in which the substantial evidence standard of review is used) are furnished for the reviewing judge, only a brief written statement containing the reasons for disciplinary actions and the evidence relied on for that action is submitted by prison administrators for review purposes [under an arbitrary and capricious standard].[128]

No matter how expansive the standard employed by a court in a declaratory judgment action to review the prison board factfinding, petitioner Reed will not be helped. The facts relating to his escape had already been determined in the criminal trial by a jury finding of guilty—and that on the heaviest proof burden possible, proof beyond a reasonable doubt.[129] But Reed's case, one in which the disciplinary hearings concerned an infraction for which the prisoner had been prosecuted at a criminal trial, is not by any means the usual prison disciplinary case.

Thus, a difference in the scope of review that is irrelevant to Reed may well prove determinative in other prison cases. I would, therefore, like to see the court in effect reverse its decision in *Reed* by providing an APA standard of review under the Declaratory Judgment Act. Waiting for the court to act, however, is not the only, nor even the best, way to avoid the *Reed* result.

B. Legislative Response

The best way to assure an APA standard of review to prisoner challenges of prison disciplinary and other board decisions is for the legislature to respond by statute to *Reed*. There are several ways for the legislature to achieve a reversal of the *Reed* result by clarifying for the court the legislative intent to provide to prisoners judicial review under the APA. I would like to present two possible statutory solutions.

The first and easiest way to avoid the *Reed* result is to amend the language in the Nebraska prison disciplinary procedures statute upon which the *Reed* decision was based. Section 83-4,123, "Access to Courts and Legal Assistance Unrestricted," would be amended as follows:[130]

> Nothing in sections 83-4,109 to 83-4,123 shall be construed as to restrict or impair an inmate's free access to the courts, *and* necessary legal assist-

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Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938) *and* McDonald v. Board of Trustees, 375 F. Supp. 95, 103 (N.D. Ill. 1974).

128. Meyers & Rabiej, *supra* note 43, at 549.

129. State v. Reed, 205 Neb. 45, 48, 286 N.W.2d 111, 113 (1979). Additionally, this jury finding would have been based on evidence admitted according to the strictest evidentiary and constitutional standards.

130. Use of full capitals indicates new language added; use of italics indicates language deleted.

ance in any cause of action arising under sections 83-4,109 to 83-4,123, OR JUDICIAL REVIEW AS DESCRIBED IN SECTIONS 84-917 to 84-919.[131]

The second way statutorily to assure judical review is to address specifically the prison hearings giving rise to a right of judicial review, and then to describe particularly the nature and scope of the review to be provided. In the Model Sentencing and Corrections Act, for example, judicial review is authorized for: (1) an adverse classification decision,[132] (2) a major adverse disciplinary decision,[133] and (3) a decision excluding a visitor from the prison.[134] In these cases, the Model Act provides judicial review tailored specifically for the prison context[135] and designed to be "relatively fast and inexpensive."[136]

The virtue of a specific and detailed provision governing judicial review of prison hearing decisions is that the legislature can address statutorily the problems and needs peculiar to prisons as agencies. If, for example, most prison hearings involve minor deprivations[137] and mild sanctions and, in the legislative judgment, would demand too much court time in relation to the significance of the claims, then the legislature could follow the example of the Model Act and exclude all but those disciplinary hearings involving serious deprivations.[138] In the Model Act, moreover, the potential of serious deprivation as a punishment also triggers the right to a more formal hearing at the prison.[139] Thus, the ultimate decision as to whether a formal hearing and judicial review are to be provided to a prisoner rests in the hands of the prison administration.[140] The administration may avoid a formal hearing and judicial review in a proceeding merely by excluding serious deprivation as a possible punishment.[141]

131. NEB. REV. STAT. §§ 84-917 to -919 (Reissue 1976) are the judicial review sections of the APA.
132. M.S.C.A. § 1-104, Comment. This does not include initial classification decisions.
133. *Id.* § 4-508 & accompanying Comment.
134. *Id.* § 4-118 & accompanying Comment. In this instance the right of judicial review is that of both the visitor and prisoner. *Id.*
135. *Id.* § 1-103 & accompanying Comment. The Model Act also provides specific provisions governing prison rulemaking.
136. *Id.* § 1-104, Comment.
137. See text accompanying note 69 *supra*.
138. In so doing the legislature must remember to evaluate "serious deprivations" in light of the prison context. These were defined in the Model Act as, among others, confinement of a prisoner to his own cell for more than 10 days or in separate housing for more than 10 days, loss of privileges for more than 40 days, and loss of good time. M.S.C.A. § 4-508.
139. *Id.* § 4-507(b).
140. *Cf.* Scott v. Illinois, 440 U.S. 367 (1979) (sixth amendment right to lawyer attaches only if imprisonment is to be the punishment imposed).
141. Of course, this decision will be affected by the seriousness of the infraction.

The Model Act judicial review provision, which would make judicial review applicable and thus also solve the *Reed* problem, reads as follows:

§ 1-104. [Judicial Review of Contested Cases.]

(a) A person who has exhausted all administrative remedies available within the department and who is aggrieved by a final decision in a proceeding for which judicial review is authorized is entitled to judicial review under this section.

(b) Proceedings for review must be instituted by filing a [petition; complaint] in the [District Court of ——— County] within [10] days after notice of the final decision of the department. Copies of the [petition; complaint] must be served upon the department.

(c) The filing of a [petition; complaint] does not itself stay enforcement of the department's decision. The department may grant or, upon its refusal to do so, the reviewing court may order a stay upon appropriate terms.

(d) If a [petition; complaint] for review on its face reflects that it is meritorious, the reviewing court shall order the department to transmit to the reviewing court in the form maintained by the department a copy of the entire record of the proceeding under review. By stipulation of all parties to the review proceeding, the record may be shortened.

(e) The review shall be conducted by the court without a jury and confined to the record. In cases of alleged irregularities in procedure before the department, not shown in the record, proof thereon may be taken in the court.

(f) The court may not substitute its judgment for that of the department as to the weight of the evidence on questions of fact. The court may affirm the decision of the department or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the person have been prejudiced because the findings, inferences, conclusions, or decisions of the department are:

(1) in violation of a constitutional, statutory, or administrative provision;

(2) in excess of the authority of the department;

(3) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(4) arbitrary or capricious.[142]

VII. CONCLUSION

The Nebraska Supreme Court in *Reed* went out of its way to avoid the plain language of the Nebraska APA and find its judicial review provisions inapplicable to prison disciplinary decisions. The court also misevaluated the policy considerations underlying judicial review—both with respect to the court's attempt to find legislative intent and, more generally, with respect to the nature

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Nonetheless, I believe it to be preferred by prison administrators to a general provision granting judicial review since it leaves them the discretion to evaluate a case and make a choice as to the level of formality required.

142. M.S.C.A. § 1-104.

and efficacy of judicial review. The APA provides an appropriate standard of review, and prison decisions, of all agency decisions, should not be set apart from court scrutiny. Until the legislature acts, I hope that the court will correct its decision in *Reed* by expressly finding that the Declaratory Judgment Act is applicable to prison hearings and by employing a standard of review equivalent to that of the APA.